

International Law Studies—Volume 3

International Law Discussions

It would be better in this case to substitute Article XLVI of The Hague Convention with respect to the laws and customs of war on land in place of Article 12 of the Naval War Code. Naval forces thus occupying hostile countries, by the simple fact of occupation become amenable to the rules of The Hague Convention. This Article XLVI with an introductory clause would read: In hostile countries occupied by forces of the United States of America, "Family honor and rights, individual lives and private property as well as religious convictions and liberty, must be respected." There are also other Hague Convention articles that should be inserted here. (See Section III.—On Military Authority over Hostile Territory, p. 155.)

SECTION III.—BELLIGERENT AND NEUTRAL VESSELS.

Article 13.

All public vessels of the enemy are subject to capture, except those engaged in purely charitable or scientific pursuits, in voyages of discovery, or as hospital ships under the regulations hereinafter mentioned.

Cartel and other vessels of the enemy, furnished with a proper safe-conduct, are exempt from capture unless engaged in trade or belligerent operations.

(a) Would a vessel flying an enemy flag and carrying supplies to a neutral state where a famine exists be liable to capture and under what circumstances?

"A vessel flying an enemy flag and carrying supplies to a neutral state where a famine exists" might not be liable to capture if the vessel were public and the supplies were of a charitable nature destined for the relief of the famine.

Such a use of supplies could not directly or indirectly aid the enemy, but rather by the amount of the supplies lessen the enemy's resources. Of course, if the supplies were destined for the neutral country simply because a higher price could be secured on account of existence of the famine, the vessel and supplies as engaged in a commercial undertaking would be liable to capture.

The officer must judge, and in case of doubt should send the vessel into a port of his own state.

If the vessel be a private vessel of the enemy it is subject to capture under Article 14 of the Naval War Code. In time of war other arrangements must be made for the transportation of such supplies, e. g., by neutral vessels, by enemy vessel under pass previously obtained, etc.

(b) Should a vessel engaged in making deep-sea soundings be exempt from capture as engaged in scientific pursuits?

Vessels engaged in deep-sea soundings might not be liable to capture because engaged in scientific pursuits, but from the nature of the vessel it could be directly utilized for hostilities, e. g., the vessel could be used for grappling cables, or for cable laying, etc.

The officer must judge, but such a vessel doubtless would be sent into port without exception, or if exception were made it would be only in the rarest instances.

(c) Are private vessels "engaged in purely charitable or scientific pursuits, in voyages of discovery" liable to capture? Why?

Private vessels "engaged in purely charitable or scientific pursuits, in voyages of discovery" are liable to capture. While such vessels may in no way contribute toward strengthening the enemy, but rather divert a certain amount from his military resources, yet the difficulty of responsible control is so great that these vessels should be exempt only by grace of the commander in the immediate region, not by general rule.

(d) How should vessels engaged in religious and missionary work be treated?

Vessels engaged in purely religious and missionary work would be exempt under this section as engaged in charitable pursuits provided they are public vessels. Such cases, however, would be exceedingly rare. Private vessels thus engaged should be left as in the prior case (c) to the discretion of the commander. In all such cases, the ranking officer in the region acts on his own responsibility and should accordingly guard against possible injury from such vessels. He has absolute right to forbid the vessels to engage in religious and

missionary service during the continuance of hostilities, or even to capture these enemy vessels.

(e) How should a boat belonging exclusively to the light-house service be treated?

Boats belonging exclusively to the light-house service should in general be liable to the penalties of unarmed vessels engaged in the enemy's service. No exemption should be made by rule, as the service is, or may be, made of great military importance.

An exception was formally made in time of war in the Prize Law of Japan in 1894, when exemption from capture was extended to "boats belonging to light-houses." The nature of the light-house service in China at this time may have prompted this extension.¹

Article 14.

All merchant vessels of the enemy, except coast fishing vessels innocently employed, are subject to capture, unless exempt by treaty stipulations.

In case of military or other necessity, merchant vessels of an enemy may be destroyed, or they may be retained for the service of the Government. Whenever captured vessels, arms, munitions of war, or other material are destroyed or taken for the use of the United States before coming into the custody of a prize court, they shall be surveyed, appraised, and inventoried by persons as competent and impartial as can be obtained; and the survey, appraisal, and inventory shall be sent to the prize court where proceedings are to be held.

(a) Should the word "private" be inserted in the place of the word "merchant" in both instances in Article 14?

The word "private" should be inserted in place of "merchant" in both instances in Article 14, for reasons already given under Article 11 (b).

(b) What should be the treatment of vessels engaged in deep-sea fisheries? Why?

Whale, seal, cod, or other fish not taken to market in natural form, but salted or otherwise changed, are lines of fisheries which render vessels so engaged liable to

¹ Takahashi, *Cases an International Law, Chino-Japanese*, p. 179.

capture because such vessels are primarily engaged in commercial ventures, and the shore population is not immediately dependent upon them. This position is fully discussed in the case of the *Paquete Habana* (175 U. S., 677), with the following conclusions:

The review of the precedents and authorities on the subject appears to us abundantly to demonstrate that at the present day, by the general consent of the civilized nations of the world, and independently of any express treaty or other public act, it is an established rule of international law, founded on considerations of humanity to a poor and industrious order of men, and of the mutual convenience of belligerent states, that coast-fishing vessels, with their implements and supplies, cargoes and crews, unarmed and honestly pursuing their peaceful calling of catching and bringing in fresh fish, are exempt from capture as prize of war.

The exemption, of course, does not apply to coast fishermen or their vessels if employed for a warlike purpose, or in any such way as to give aid or information to the enemy; nor when military or naval operations create a necessity to which all private interests must give way.

Nor has the exemption been extended to ships or vessels employed on the high sea in taking whales or seals or cod or other fish which are not brought fresh to market, but are salted or otherwise cured and made a regular article of commerce.

(c) Should the words "or other" in line 5 of Article 14 be stricken out? Why?

The words "or other" should not be stricken out. The action following could be justified not only on the ground of military necessity, but also on other grounds, as in case of dangerous epidemic on a captured ship, etc.

Article 15.

Merchant vessels of the enemy that have sailed from a port within the jurisdiction of the United States, prior to the declaration of war, shall be allowed to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy.

Merchant vessels of the enemy, in ports within the jurisdiction of the United States at the outbreak of war, shall be allowed thirty days after war has begun to load their cargoes and depart, and shall thereafter be permitted to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy.

Merchant vessels of the enemy, which shall have sailed from any foreign port for any port within the jurisdiction of the United States before the declaration of war, shall be permitted to enter and discharge their cargo and thereafter to proceed to any port not blockaded.

(For the discussion and final opinion of the Conference upon Article 15 as a whole, see page 57 and page 63. It was as set forth in the form of an amended article of the code as follows:

“In absence of treaty governing the case, the treatment to be accorded private vessels of an enemy sailing to or from a port of the United States prior to the beginning of a war, or sojourning in a port of the United States at the beginning of a war will be determined by special instructions from the Navy Department.”)

(a) Should the word “private” be inserted for the word “merchant” in all instances in Article 15?

The word “private” should be inserted in the place of the word “merchant” in line 1, of Article 15. In other cases the word “merchant” may remain. There should be some provisions in the code for the sojourn, etc., of private vessels other than merchant vessels.

(b) Is not the first paragraph of Article 15 too liberal in its provisions?

The first paragraph of Article 15 is more liberal than has been admitted generally in earlier practice and from the point of view of many well qualified to give an opinion is too liberal, even considering the fact that the United States has uniformly been a leader in favoring the freedom of commerce. (See Questions on Article 15, page 57 ff.)

(c) How should the words, “war has begun,” line 9, of Article 15, be interpreted?

The words “war has begun” must be interpreted, in case a declaration is issued, as from the date of the declaration, and in case of no declaration, as from the first outbreak of hostilities.

(d) Should a vessel of the enemy under the rule of the last paragraph of Article 15 be allowed to enter and discharge its cargo at a port for which it had regularly sailed before the declaration of war, even though that

port is blockaded, and thence "proceed to any port not blockaded?"

I. This case supposes that a port within the jurisdiction of the United States before the declaration of war has passed into the jurisdiction of the enemy and is blockaded by the United States, and that a merchant vessel of the enemy sailed for the port before the declaration of war.

II. Or, again, it is assumed that this rule allows free trade with the territory which has passed from the United States jurisdiction into the hands of the enemy, provided the merchant vessel of the enemy shall have sailed from the foreign port before the declaration of war.

III. Or, again, would this rule not apply to ports within the jurisdiction of the enemy at the time of sailing before the declaration of war but within the jurisdiction of the United States at the time of arrival of the vessel?

While the rule as it stands possibly might provide for such a case or such cases, manifestly such is not the intent of the rule.

The rule as it should read would provide for that class of enemy vessels which before the declaration sail for ports within the jurisdiction of the United States. The clause should therefore read: "Merchant vessels of the enemy, which before the declaration of war shall have sailed from any foreign port for any port within the jurisdiction of the United States." In regard to the last clause of the last paragraph, however, a question may be raised. This clause permits the vessel to proceed to any port not blockaded. The wording would naturally prohibit departure to a port of the United States blockaded by the enemy as well as to ports of the enemy blockaded by the United States forces. This requirement may not always be advisable. Further, it allows the departure to certain other ports to which it might be advisable to prohibit sailing either from the nature of the port or from the nature of the service rendered by the vessel.

This clause seems too liberal and it would be advisable to retain the naming of the port of destination within the power of the United States, as the United States has permitted the entrance and departure of the vessel. The clause may therefore better read "thereafter to proceed to any port which the United States shall permit;" also in second line from end change "permitted" to "allowed."

The aim of this change is to retain for the United States fuller jurisdiction of enemy vessels in port during war, while not depriving them of reasonable freedom.

(e) Should this article be rewritten? If so, how should it read?

QUESTIONS ON ARTICLE 15.

The first question is raised in regard to the vessels that are known as auxiliary or volunteer navy. Should these while still engaged in mercantile transactions be treated as private vessels under Article 15 or shall they be regarded as public vessels? There is a considerable difference of opinion in regard to the character of these vessels. Some regard such vessels within the prohibited class under the Declaration of Paris; and others regard them as legitimate and necessary under the present system.

Hall speaks of the volunteer navy as follows: "The sole real difference between privateers and a volunteer navy is then that the latter is under naval discipline, and it is not evident why privateers should not also be subjected to it. It can not be supposed that the Declaration of Paris was merely intended to put down the use of privateers governed by the precise regulations customary up to that time. Privateering was abandoned because it was thought that no armaments maintained at private cost, with the object of private gain, and often necessarily for a long time together beyond the reach of the regular naval forces of the state, could be kept under proper control. Whether this belief was well founded or not is another matter. If the organization intended to be given to the Prussian volunteer navy did not possess sufficient safeguards, some

analogous organization no doubt can be procured which would provide them. If so, there could be no objection on moral grounds to its use; but unless a volunteer navy were brought into closer connection with the state than seems to have been the case in the Prussian project it would be difficult to show as a mere question of theory that its establishment did not constitute an evasion of the Declaration of Paris.

“The incorporation of a part of the merchant marine of a country in its regular navy is, of course, to be distinguished from such a measure as that above discussed. A marked instance of incorporation is supplied by the Russian volunteer fleet. The vessels are built at private cost, and in time of peace they carry the mercantile flag of their country; but their captain and at least one other officer hold commissions from their sovereign, they are under naval discipline, and they appear to be employed solely in public services, such as the conveyance of convicts to the Russian possessions on the Pacific. Taking the circumstances as a whole, it is difficult to regard the use of the mercantile flag as serious; they are not merely vessels which in the event of war can be instantaneously converted into public vessels of the state, they are properly to be considered as already belonging to the imperial navy. The position of vessels belonging to the great French mail lines is different. They are commanded by a commissioned officer of the navy, but so long as peace lasts their employment is genuinely private and commercial; means is simply provided by which they can be placed under naval discipline and turned into vessels of war so soon as an emergency arises. They are not now incorporated in the French navy, but incorporation would take place on the outbreak of hostilities.” (International Law, 4th ed., p. 549.)

Of volunteer and auxiliary navies briefly it may be said: “The relationship of private vessels to the state in time of war, which had been settled by the Declaration of Paris in 1856, was again made an issue by the act of Prussia in the Franco-German war. By a decree of July 24, 1870, the owners of vessels were invited to

equip them for war and place them under the naval discipline. The officers and crews were to be furnished by the owners of the vessels, to wear naval uniform, to sail under the North German flag, to take oath to the articles of war, and to receive certain premiums for capture or destruction of the enemy's ships. The French authorities complained to the British that this was privateering in disguise and a violation of the Declaration of Paris. The law officers of the crown declared that there was 'a substantial difference' between such a volunteer navy and a system of privateering, and that the action of Prussia was not contrary to the Declaration of Paris. With this position some authorities agree, while others dissent. The weight of the act as a precedent is less on account of the fact that no ships of this navy ever put to sea. Similarly, the plan of Greece for a volunteer navy in 1897 was never put into operation.

"Russia, in view of possible hostilities with England in 1877-1878, accepted the offer of certain citizens to incorporate into the navy during the war vessels privately purchased and owned. Such vessels are still numbered in the 'volunteer fleet,' and, though privately owned and managed, are, since 1886, under the Admiralty. These vessels may easily be converted into cruisers, and are, so far as possible, favored with government service. There seems to be little question as to the propriety of such a relationship between the state and the vessels which may be used in war.

"Still less open to objection is the plan adopted by Great Britain in 1887 and by the United States in 1892, by which these governments, through agreements with certain of their great steamship lines, could hire or purchase at a fixed price certain specified vessels for use in case of war. The construction of such vessels is subject to government approval, and certain subsidies are granted to these companies. In time of war both officers and men must belong to the public forces. The plans of Russia, Great Britain, and the United States have met with little criticism." (Wilson and Tucker, *International Law*, 2d ed., p. 255.)

Lawrence declares his opinion as follows: "The legality of a volunteer navy must depend, like the legality of a volunteer army, upon the closeness of its connection with the state, and the securities it affords for a due observance of the laws of war." (Principles of International Law, p. 435.)

Article 9 of this code (which earlier was voted to be stricken out as unessential) certainly recognizes under the term "auxiliaries," the officers and men of such vessels as in the category of armed forces when commissioned and perhaps at all times of war.

The status of a private vessel which has assumed certain public obligations is in some respects shown in the decision in regard to the *Panama*, rendered by the United States Supreme Court on February 26, 1900. The résumé of the case is as follows:

The *Panama* was a steamship of 1,432 tons register, carrying a crew of seventy-one men, all told, owned by a Spanish corporation, sailing under the Spanish flag, having a commission as a royal mail ship from the Government of Spain, and plying from and to New York and Havana and various Mexican ports, with general cargoes, passengers, and mails. At the time of her capture, she was on a voyage from New York to Havana, and had on board two breech-loading Hontoria guns of 9 centimeters bore, one mounted on each side of the ship, one Maxim rapid-firing gun on the bridge, twenty Remington rifles, and ten Mauser rifles, with ammunition for all the guns and rifles, and thirty or forty cutlasses. The guns had been put on board three years before, and the small arms and ammunition had been on board a year or more. Her whole armament had been put on board by the company in compliance with its mail contract with the Spanish Government (made more than eleven years before, and still in force), which specifically required every mail steamship of the company to "take on board, for her own defense," such an armament, with the exception of the Maxim gun and the Mauser rifles.

That contract contains many provisions looking to the use of the company's steamships by the Spanish Government as vessels of war. Among other things, it requires that each vessel shall have the capacity to carry 500 enlisted men; that that government, upon inspection of her plans as prepared for commercial and postal purposes, may order her deck and sides to be strengthened so as to support additional artillery; and that, in case of the suspension of the mail service by naval war, or by hostilities in any of the seas or ports visited by the company's vessels, the government may take possession of them with their equipment and supplies, at a valuation

to be made by a commission; and shall at the termination of the war return them to the company, paying 5 per cent on the valuation while it has them in its service, as well as an indemnity for any diminution in their value.

The *Panama* was not a neutral vessel; but she was enemy property, and as such, even if she carried no arms (either as part of her equipment, or as cargo), would be liable to capture, unless protected by the President's proclamation.

It may be assumed that a primary object of her armament, and in the time of peace, its only object, was for purposes of defense. But that armament was not of itself inconsiderable, as appears, not only from the undisputed facts of the case, but from the action of the district court, upon the application of the commodore commanding at the port where the court was held, and on the recommendation of the prize commissioners, directing her arms and ammunition to be delivered to the commodore for the use of the Navy Department. And the contract of her owner with the Spanish Government, pursuant to which the armament had been put on board, expressly provided that, in case of war, that government might take possession of the vessel with her equipment, increase her armament, and use her as a war vessel; and, in these and other provisions, evidently contemplated her use for hostile purposes in time of war.

She was, then, enemy property, bound for an enemy port, carrying an armament susceptible of use for hostile purposes, and herself liable, upon arrival in that port, to be appropriated by the enemy to such purposes.

The intent of the fourth clause of the President's proclamation was to exempt for a time from capture peaceful commercial vessels; not to assist the enemy in obtaining weapons of war. This clause exempts "Spanish merchant vessels" only, and expressly declares that it shall not apply to "Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government."

Upon full consideration of this case, this court is of the opinion that the proclamation, expressly declaring that the exemption shall not apply to any Spanish vessel having on board any article prohibited or contraband of war, or a single military or naval officer, or even a dispatch, of the enemy, can not reasonably be construed as including, in the description of "Spanish merchant vessels" which are to be temporarily exempt from capture, a Spanish vessel owned by a subject of the enemy; having an armament fit for hostile use; intended, in the event of war, to be used as a war vessel; destined to a port of the enemy; and liable, on arriving there, to be taken possession of by the enemy, and employed as an auxiliary cruiser of the enemy's navy, in the war with this country.

The result is, that the *Panama* was lawfully captured and condemned, and that *the decree of the district court must be affirmed.* (176 U. S., 547.)

Such vessels are certainly potentially war vessels and are certainly designed and liable to conversion for use in war. In no case are such vessels purely private vessels because the Government has a prior right to convert them to its use under terms of their registration or by virtue of specific contract as the case may be. (27 Stat. L., act May 10, 1892.)

This being the case it would be for the Government to enunciate its policy at the time in regard to such vessels and to determine whether such vessels were actually "in the military service of the enemy" or not. The status of such auxiliary vessels being at present uncertain, it would be advisable to allow the wording of the code in Article 9 to stand as it is sufficiently broad to permit seizure should policy or act of the vessel require seizure while not throwing the responsibility upon the naval officer to decide in regard to a class of vessels whose status is uncertain. If such vessels are clearly in the military service of the enemy, they are not by Article 15 entitled to exemption. In any case the status of auxiliary vessels should be made clear.

Again, while it can not be said that the provisions of the first clause of Article 15 are absolutely established in international law, they are, however, so well established that the privilege of entry and departure of *bona fide* private vessels would be allowed by all nations. It was so allowed in the Crimean war, 1854; in the Franco-Prussian war of 1870, and Russo-Turkish war of 1877, and in the Spanish-American war of 1898 by the United States. It is proper that some provision upon this matter be made known to the officers of the Navy either in the code or elsewhere.

In regard to the "thirty days" allowance mentioned in the second clause of Article 15, it may be said that both longer and shorter times have been allowed, that it is now general to allow some time, and that probably the naval department of the Government is not competent to fix the length of time. Therefore it would be well to word the clause so as to read: "Merchant vessels of the enemy in ports within the jurisdiction of the United

States at outbreak of war when allowed a specified time after war has begun to load their cargoes and depart, shall thereafter be permitted to proceed to their destination, unless they are engaged in carrying contraband of war or are in the military service of the enemy." Thus the Government is not committed beyond what international law sanctions though taking a reasonably liberal position.

It should be observed that this whole Article 15 gives to commerce between the enemy and the United States a measure of exemption that is not given to the commerce between the enemy and a neutral. This is in one way illogical yet it is desirable to give the widest exemption to commerce as the destruction of commerce does not bring any commensurate military advantage.

OPINION OF COMMITTEE OF THE CONFERENCE.

In view of the objections raised upon various grounds to Article 15, it was voted by the Conference that a committee consider what changes should be made therein. This committee, after debating the merits of positive positions, decided that in view of disagreement among authorities, and in practice, and pending an international convention, Article 15 should read: "In absence of treaty governing the case, the treatment to be accorded private vessels of an enemy sailing prior to the beginning of a war, to or from a port of the United States or sojourning in a port of the United States at the beginning of a war, will be determined by special instructions from the Navy Department."

This was the action taken by the Navy Department in publishing General Order No. 492 on June 20, 1898. This order, "prepared by the Department of State" and "published for the information and guidance of the naval service," contains several clauses not so liberal toward neutrals as those in Article 15 of the Naval War Code, though very liberal in their provisions. This order states in section 17 that merchant vessels of the enemy "are good prize, and may be seized anywhere, except in neutral waters." To this rule, however, the

President's proclamation of April 26, 1898, in order to provide against undue hardships in the beginning of the war, made the following exceptions:

4. Spanish merchant vessels in any ports or places within the United States, shall be allowed till May 21, 1898, inclusive, for loading their cargoes and departing from such ports or places; and such Spanish merchant vessels, if met at sea by any United States ship, shall be permitted to continue their voyage, if, on examination of their papers, it shall appear that their cargoes were taken on board before the expiration of the above term: *Provided*, That nothing herein contained shall apply to Spanish vessels having on board any officer in the military or naval service of the enemy, or any coal (except such as may be necessary for their voyage), or any other article prohibited or contraband of war, or any dispatch of or to the Spanish Government.

5. Any Spanish merchant vessel which, prior to April 21, 1898, shall have sailed from any foreign port bound for any port or place in the United States, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and any such vessel, if met at sea by any United States ship, shall be permitted to continue her voyage to any port not blockaded.

The following clauses of General Order 492 of the Navy Department contain the material applying to this subject:

3. Neutral vessels are entitled to notification of a blockade before they can be made prize for its attempted violation. The character of this notification is not material. It may be actual, as by a vessel of the blockading force, or constructive, as by a proclamation of the government maintaining the blockade, or by common notoriety. If a neutral vessel can be shown to have had notice of the blockade in any way, she is good prize and should be sent in for adjudication; but, should formal notice not have been given, the rule of constructive knowledge arising from notoriety should be construed in a manner liberal to the neutral.

4. Vessels appearing before a blockaded port, having sailed without notification, are entitled to actual notice by a blockading vessel. They should be boarded by an officer, who should enter in the ship's log the fact of such notice, such entry to include the name of the blockading vessel giving notice, the extent of the blockade, the date and place, verified by his official signature. The vessel is then to be set free; and should she again attempt to enter the same or any other blockaded port as to which she has had notice she is good prize.

7. In accordance with the rule adopted by the United States in the existing war with Spain, neutral vessels found in port at the time of

the establishment of a blockade will, unless otherwise ordered by the United States, be allowed thirty days from the establishment of the blockade to load their cargoes and depart from such port.

Article 16.

Neutral vessels in the military or naval service of the enemy, or under the control of the enemy for military or naval purposes, are subject to capture or destruction.

What should be done in case a neutral vessel within neutral territory is found to be transmitting messages to the enemy by means of wireless telegraphy?

Article 16 covers the rule for neutral vessels within the field of belligerent action. The code does not cover the field of peaceful action which neutral waters are ever supposed to be.

In case a neutral vessel within neutral territory is found to be transmitting messages to the enemy by wireless telegraphy the vessel is guilty of unneutral service and is liable to the penalties consequent upon such service when within the field of belligerent action, but so long as she remains within neutral waters while the service is unchanged so far as the neutral vessel is concerned, no belligerent act may be performed against the neutral vessel in neutral territory. The act should be reported to the government in whose jurisdiction the vessel is with a request that the vessel be restrained and it should also be reported to the home government for diplomatic consideration.

It would be permissible to use any means to intercept the messages outside of neutral jurisdiction. The case is somewhat parallel to that of submarine telegraphy. The international law status of wireless telegraphy is as yet undefined. Doubtless agreements in regard to the use of this means of communication must be made.

Article 17.

Vessels of war of the United States may take shelter during war in a neutral port subject to the limitations that the authorities of the port may prescribe as to the number of belligerent vessels to be admitted into the port at any one time. This shelter, which is allowed

by comity of nations, may be availed of for the purpose of evading the enemy, from stress of weather, or to obtain supplies or repairs that the vessel needs to enable her to continue her voyage in safety and to reach the nearest port of her own country.

(a) Would it be a ground for protest if a neutral state prescribed other limitations than those in regard to "the number of belligerent vessels to be admitted into the port at any one time?"

It would be no ground for protest if a neutral prescribed other limitations than those in regard to "the number of belligerent vessels to be admitted into the port at any one time." The neutral port regulations are matters within neutral competence, as is shown by Article 18 and as is affirmed by all writers on international law.

(b) How should the words "to continue her voyage in safety" be interpreted? Do these words refer to the clause "to obtain supplies" in line 7 of Article 17?

"To continue her voyage in safety" must be interpreted with reference to the last clause of Article 18, which forbids increase in "armament military stores, or in the number of the crew of a vessel of war."

The wording is too free according to the generally accepted standards as "safety" may be made to apply to security from enemies as well as from the elements of nature. The generally admitted repairs and supplies are those necessary for the continuance of the voyage to the nearest home port with reference to the risks due to natural causes.

Further, the supplies are by the last clause of Article 18 limited to those not military in their nature. "To continue her voyage in safety" refers to one or both of the words "supplies" or "repairs" with the above-mentioned restrictions on the nature of the supplies.

Article 18.

Such vessel or vessels must conform to the regulations prescribed by the authorities of the neutral port with respect to the place of anchorage, the limitation of the stay of the vessel in port, and the time to elapse before

sailing in pursuit or after the departure of a vessel of the enemy.

No increase in the armament, military stores, or in the number of the crew of a vessel of war of the United States shall be attempted during the stay of such vessel in a neutral port.

Might it not often be necessary to violate the provisions of the last sentence of Article 18 in order to obtain supplies or repairs sufficient to enable a vessel "to continue her voyage in safety?"

The last sentence in Article 18 is in accord with the generally accepted opinion of the rule of correct action in a neutral port. The phrase "to continue her voyage in safety" should be interpreted as above stated with reference to safety from the dangers of the sea rather than dangers from enemies. The Netherlands issued the following during the war between the United States and Spain: "It is forbidden to supply arms or ammunition to the ships of war or privateers of the powers at war, as also to render them any assistance whatever in the increasing of their crews, arming, or equipment, and in general to voluntarily perform any act that might endanger the neutrality of the state."

Article 19.

A neutral vessel carrying the goods of an enemy is, with her cargo, exempt from capture, except when carrying contraband of war or endeavoring to evade a blockade.

Should the words "or guilty of unneutral service" be added after the word "blockade" in the last line of Article 19?

With the increase in the forms of service which neutral vessels may render, they should certainly have no more liberal treatment than mail steamers in Article 20, for mail steamers are or may be under a partial government control, and these are liable to detention for "violation of the laws of war with respect to contraband blockade, or unneutral service."

The words "or guilty of unneutral service" should certainly be added to Article 19.

Article 20.

A neutral vessel carrying hostile dispatches, when sailing as a dispatch vessel practically in the service of the enemy, is liable to seizure. Mail steamers under neutral flags carrying such dispatches in the regular and customary manner, either as a part of their mail in their mail bags, or separately as a matter of accommodation and without special arrangement or remuneration, are not liable to seizure and should not be detained, except upon clear grounds of suspicion of a violation of the laws of war with respect to contraband, blockade, or unneutral service, in which case the mail bags must be forwarded with seals unbroken.

(a) Would the transmission of hostile dispatches received by a neutral vessel on the high sea make that vessel liable to seizure; if so, for how long a time?

Dana, in note 228 to Wheaton's International Law, says:

Suppose a neutral vessel to transmit signals between two portions of a fleet engaged in hostile combined operations, and not in sight of each other. She is doubtless liable to condemnation. It is immaterial whether these squadrons are at sea or in ports of their own country or in neutral ports, or how far they are apart or how important the signals may be to the general results of the war, or whether the neutral transmits them directly or through a repeating neutral vessel. The nature of the communication establishes its final destination and it is immaterial how far the delinquent carries it on its way. The reason of the condemnation is the nature of the service in which the neutral is engaged.

The neutral vessel transmitting hostile dispatches is liable to seizure as engaged in unneutral service. Taylor says:

No overt act could be performed by a neutral in aid of a belligerent more clearly unlawful than the transmission of signals or the carrying of messages between two portions of a fleet engaged in concert in hostile operations, and not in sight of each other. It makes no difference whether such fleets or squadrons are in ports of their own country, in neutral ports, or on the high seas, or whether such signals are transmitted by the neutral directly or through a repeating neutral vessel. No matter whether such communications be verbal or written, important or unimportant to the general results of the war, as the criminality of the act depends alone upon the nature of the service in which the neutral is engaged. The same principle extends to signalling or bearing of messages between a

land force and a fleet, or to the laying of a cable to be used chiefly or exclusively for hostile purposes. (International Public Law, p. 754, sec. 670.)

Of the nature of such service Lawrence well says:

We are now in a position to distinguish clearly between the offense of carrying contraband and the offense of engaging in unneutral service. They are unlike in nature, unlike in proof, and unlike in penalty. To carry contraband is to engage in an ordinary trading transaction which is directed toward a belligerent community simply because a better market is likely to be found there than elsewhere. To perform unneutral service is to interfere in the struggle by doing in aid of a belligerent acts which are in themselves not mercantile, but warlike. In order that a cargo of contraband may be condemned as good prize, the captors must show that it was on the way to a belligerent destination. If without subterfuge it is bound to a neutral port, the voyage is innocent, whatever may be the nature of the goods. In the case of unneutral service the destination of the captured vessel is immaterial. The nature of her mission is the all-important point. She may be seized and confiscated when sailing between two neutral ports. The penalty for carrying contraband is the forfeiture of the forbidden goods, the ship being retained as prize of war only under special circumstances. The penalty for unneutral service is first and foremost the confiscation of the vessel, the goods on board being condemned when the owner is involved or when fraud and concealment have been resorted to.

Nothing but confusion can arise from attempting to treat together offenses so widely divergent as the two now under consideration. (Principles of International Law, p. 633.)

The liability to seizure attaches to the vessel in consequence of the act performed, not because of the possession of the dispatches (which in case of wireless telegraphic dispatches might be outside of the vessel almost immediately). The nature of the act is or may be more noxious than that of breaking a blockade or any other act for which liability attaches to the vessel till the completion of the voyage and return to the home port. Liability therefore to seizure attaches to the vessel guilty of the transmission of such dispatches till return to the home port.

(b) Under Article 20, would repetition by a neutral vessel of signals made by a belligerent vessel to a remote belligerent vessel make the neutral vessel liable to seizure, all the vessels being on the high sea?

Yes, as above under clause allowing seizure on ground of unneutral service.

(c) Should the Naval War Code contain an article upon unneutral service? If so, what should it cover and how should it read?

No. It is better to leave that to the progress of opinion as the range of action to be considered under unneutral service will continually change. Lawrence, after mentioning that—

A neutral ship is forbidden to—

- (1) Transmit certain kinds of signals or messages for a belligerent;
- (2) Carry certain kinds of dispatches for a belligerent;
- (3) Transport certain kinds of persons in the service of a belligerent;

says:

The most important and the most frequently performed unneutral services are arranged under the three heads we have just enumerated. But the classification is by no means exhaustive. There are other ways of giving unlawful aid to belligerents besides those we have been considering. The exigencies of warfare are so numerous and so changeful that no one can describe beforehand every possible mode in which a neutral ship may make herself into a transport in the service of one or other of the belligerents. The principle of the law is clear. It forbids anything approaching to an actual participation in the war. The application of the principle must be settled in each case as it arises. Among the acts which it assuredly covers we may mention transferring provisions, coals, or ammunition from one belligerent ship to another at sea, and showing the channel to a fleet advancing for a hostile attack. (Principles of International Law, pp. 625 and 629.)

(d) Should the code contain an article in regard to the transfer of vessels from a belligerent to a neutral flag in the time of war?

No. This is in the main a matter of domestic law and may change with the change of national policy, therefore the code should contain no provision in regard to such transfer. It would be advisable, however, that some more definite regulations on the matter of such transfer should be made by international agreement in so far as this transfer affects international relations. (See Duboc, *Le Droit de Visite*, Chap. IV.)